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Supreme Court of the United States

October Term, 1928.

No. 183.

HENRY LEONARD, *Petitioner,*
v.
THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

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Supreme Court of the United States.

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HENRY LEONARD, *Petitioner,*
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THE UNITED STATES. } No. 183.

64 C. Cls. 384.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

Jurisdiction of the Court.

The judgment to be reviewed was rendered January 9, 1928, and dismissed the petition. The opinion was delivered by Chief Justice Campbell (R. 8–11), reported 64 C. Cls. 384. A motion for new trial was seasonably made February 10, 1928, and overruled April 2, 1928 (R. 12). The petition for writ of certiorari was filed June 8, 1928, and was granted by this court October 8, 1928.

STATEMENT OF THE CASE.

Facts.

The claim is that of a major, Marine Corps, retired from active service September 30, 1911, for physical disability consisting of the loss of the left arm at the shoulder joint, the result of wounds received in battle

July 13, 1900, to receive pay from May 8, 1926, on the retired list by continuously counting all service since retirement as well as before toward the pay period in which he shall be paid.

At the time of his retirement he had had 13 years, 1 month and 26 days service. Since his retirement he has been on active duty for a period of 4 years, 9 months and 29 days. His entire active service before and since his retirement amounts to 17 years, 11 months and 25 days up to April 1, 1926. His total time on the active and retired lists amounted to 27 years on August 3, 1925 (Findings, R. 6, 7).

The determinative act is that of March 2, 1903 (*post*, pp. 4, 13), giving preference to officers retired on account of wounds received in battle.

The question is whether an officer retired on account of wounds received in battle is entitled to count all service on the retired as well as on the active list, and whether in an active or inactive status on the retired list, in order to bring him into a higher pay period under the act of 1922. If he is entitled so to count, he is entitled to judgment for the amount claimed.

He is being paid as stated in the following paragraphs of Finding II (R. 7):

"He has been paid longevity pay as a major of 27 years' service by reason of being retired for wounds.

"If paid as a major entitled to credit of 27 years' service, he would receive as a major in the fifth pay period a difference of pay amounting from May 8, 1926, to March 31, 1927, to $723.41."

Statutes.

The statutes on which this claim depends are as follows:

Revised Statutes, Section 1261, 1262 (as amended by the act of June 30, 1882, c. 254, 22 Stat. 117, 118), 1263, 1274, 1612, and 1622 (*post*, p. 12).

Act of March 2, 1903, c. 975, 32 Stat. 927, 932 (*post*, p. 13).

Act of June 10, 1922, c. 212, 42 Stat. 625, 626, 627, 632, 633 (*post*, pp. 12–16).

Act of May 8, 1926, c. 274, 44 Stat. 417 (*post*, p. 16).

Assignment of Error.

The petitioner assigns as error in the judgment of the Court of Claims that it does not allow him the benefit of his service since retirement in order to bring him into the fifth pay period allowable "to majors of the Army * * * and officers of corresponding grade who have completed twenty-three years' service," and that judgment was not rendered in his favor for the sum due him as an officer entitled to the pay of the fifth pay period.

BRIEF OF ARGUMENT.

Summary.

The act of 1903 gives longevity pay accruing after retirement to "officers retired on account of wounds received in battle." The act of 1922 gives pay by periods dependent in part on length of service. For officers already in the service "there shall be included in the computation all service which is now counted in computing longevity pay." Service after retirement even in an inactive status being allowable under existing laws for computing longevity pay, that service is allowable to an officer retired for wounds for all purposes of computing his pay.

Legislation and Decision.

By Revised Statutes, Sections 1261, 1262, 1263, certain rates of pay were fixed for officers of each grade of rank in the Army, with an increase of ten per cent for each five years' service.

By Revised Statutes, Sections 1612, 1622, officers of the Marine Corps are to receive the same pay and allowances as those of the Army and are to be retired in the same manner.

By act of May 11, 1908, c. 163, 35 Stat. 106, 108 (recognized as applicable to the Marine Corps by the appropriation act of May 13, 1908, c. 166, 35 Stat. 127, 155) rates of pay were increased but without any difference in the mode of computation.

In *United States* v. *Tyler*, 105 U. S. 244, this court held that the "service" on which the ten per cent increase was to be computed was not only service on the active list, but service in an inactive status after retirement.

To overcome the effect of that decision in all but the most highly meritorious cases, Congress made the following provision March 2, 1903, c. 975, 32 Stat. 932 (*post*, p. 13):

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

This provision cut off longevity increases accruing to officers after their retirement except in the single case of "officers retired on account of wounds received in battle." This officer belongs to that class.

Thus matters continued until June 10, 1922, when Congress by the Joint Service Pay Act, c. 212, 42 Stat. 625, adopted a new scheme of pay periods based upon a combination of rank and length of service. By this act "The pay of the fifth period" [$3,500] "shall be paid * * * to majors * * * who have completed twenty-three years' service * * *." "The pay of the fourth period" [$3,000] "shall be paid * * * to majors * * * who have completed fourteen years' service." "The pay of the third period" [$2,400] "shall be paid to majors * * * not entitled to the pay of the fourth, fifth or sixth period." An increase of five per cent of the base pay is added for each three years' service up to thirty years.

"For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay," etc.

By Sec. 17 of the Joint Service Pay Act of 1922 (*post*, pp. 15, 16) retired officers are to have their retired pay computed on the basis of pay provided in that act.

By provision, however, of the 1st section (*post*, p. 15) nothing was to authorize increase in the pay of officers already on the retired list on June 30, 1922.

By subsequent act of May 8, 1926 (*post*, p. 16), this restriction on the pay of officers already retired June 30, 1922, was removed, and it was provided that they were to have the same pay as officers retired after that date. This act cancels the restriction on pay of officers already retired made in the act of 1922, and requires the pay of all retired officers to be calculated from May 8, 1926, on the basis of pay provided by the act of 1922.

"Service Now Counted," Act of 1922.

By a provision of the first section (*post*, p. 15) "For officers in the service on June 30, 1922, there shall be

included in the computation all service which is now counted in computing longevity pay," etc.

The service counted at the time of the passage of the act of 1922 was defined by the act of February 24, 1881, c. 79, 21 Stat. 346: "and the actual time of service in the Army or Navy or both shall be allowed all officers in computing their pay."

As such service there was counted not only active service as a commissioned officer, but the following in addition:

Service as a cadet at the Military Academy, West Point (*United States* v. *Morton*, 112 U. S. 1, *United States* v. *Watson*, 130 U. S. 30), until the right to count such service was cut off as to those thereafter entering the academy by the act of August 24, 1912, c. 391, Sec. 6, 37 Stat. 569, 594, as decided in *United States* v. *Noce*, 268 U. S. 613.

Service as an enlisted man in the Regular Army, *Stewart* v. *United States*, 34 C. Cls. 553, findings of fact and conclusion of law printed only in 16 Comp. Dec. 889, 890; *Davison* v. *United States*, 43 C. Cls. 308.

Service on the retired list even while inactive as decided in *United States* v. *Tyler*, 105 U. S. 244, until that was cut off by statute as to all officers retired for any cause but wounds received in battle by act of March 2, 1903, c. 975, 32 Stat. 932, *ante*, p. 4, *post*, p. 13.

Officers Retired for Wounds Received in Battle.

As a part of the service "now counted in computing longevity pay" the act of 1903 allowed officers retired on account of wounds received in battle to go on counting their service after retirement, even though in a status of inactivity.

Thus by express provision an officer like the present retired for wounds received in battle is entitled to go on counting his service after retirement.

Finding II (R. 7) shows that the officer receives "longevity pay as a major of 27 years' service by reason of being retired for wounds." The benefit of the same service is, however, refused to him in the computation of his base or period pay on the following ground (Opinion, R. 10, 11):

"There is nothing in Section 17 of the act of June 10, 1922, that sustains it and the provision to be found in Section 1 of the act, 42 Stat. 627, that 'For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay' does not refer to or include officers on the retired list. It has reference to officers on the active list."

This court decided the contrary in *United States* v. *Tyler*, 105 U. S. 244, where the court said as to officers retired from active service (p. 245):

"The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years.

"The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

"The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit."

The following conclusion was reached (p. 246):

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial, from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

Congress subsequently to this decision interposed by the act of March 2, 1903 (*ante*, p. 4, and *post*, p. 13), to draw a distinction between an officer retired for age or disease and one retired for wounds received in battle. That act provided that longevity increases

should go on after retirement as decided by this court in the *Tyler* case only where the officers were retired for wounds received in battle. All other officers ceased to earn longevity increases after their retirement.

At the time of the enactment of the act of 1903 the only kind of pay affected by length of service was the addition of 10 per cent for every five years' service. The new act of June 10, 1922 (*post*, pp. 12–16), provided a new scheme of pay. It made all service now counted in computing longevity pay applicable to the computation of all the pay periods provided by that act as well as of the five per cent increase for each three years of service allowed thereby.

At present this officer is being paid in the anomalous status of an officer of *twenty-seven* years' service for computing his 5 per cent increase for each three years' service, but of only *fourteen* years' service in computing his base or period pay. Plainly an officer can not be of one length of service for counting one item of his pay and of another and different length of service for counting another item.

No Distinction Between Period Pay and Longevity Pay.

The act of March 2, 1903 (*ante*, p. 4; *post*, p. 13), refers to "longevity pay" and provides that only officers retired on account of wounds received in battle shall continue to receive any increase of it after retirement.

The act of 1922 (*post*, p. 15) in requiring that "there shall be included in the computation all service which is now counted in computing longevity pay" plainly applied existing statutes regulating longevity pay both for counting the length of service required for a particular period and for computing the 5 per cent for each three years of service provided for by that act.

This officer claims the benefit of twenty-three years' service to put him into the fifth pay period as a major who has completed twenty-three years' service. As all service allowed by previously existing law for computing longevity pay is to be counted in the computation for all purposes under the act of 1922, this plainly brings this officer into the fifth period as a major of more than twenty-three years' service.

Spirit and Intent of the Law.

It is, however, when the whole spirit and intent of the law is looked at that this claim is presented in its strongest light.

This court decided in the *Tyler* case in 1882, that service went on for longevity pay purposes after retirement as well as before. Congress allowed that decision to remain in force for 21 years. In 1903 the law was changed for the future by confining such increase to "officers retired on account of wounds received in battle." No subsequent enactment has departed from that policy. True, the Solicitor General has pointed out in his brief in response to our petition for certiorari that this act of 1903 is not included in the new United States Code of 1926. That Code is, however, not a new enactment as was the Revised Statutes. On the contrary, it is provided, Code, Sec. 2, par. (a):

"The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of

this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

Those like the present officer who have been maimed in the service of their country should receive the benefits of their service after retirement as well as before, as required by the act of 1903.

The incongruity of paying this officer an increase of 5 per cent for each three years' service up to twenty-seven years and at the same time allowing him for purpose of base or period pay less than twenty-three years' service should be corrected.

When this case is tested by the acts of 1903, 1922, and 1926, this officer must be held to be for all purposes entitled to count his service after retirement as well as before, and while in an inactive as well as in an active status.

The judgment of the Court of Claims should be reversed.

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APPENDIX.

Text of Statutes.

Revised Statutes:

Sec. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * *

Major: $2,500 a year. * * *

Sec. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

Sec. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

Sec. 1274. Officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired.

Act of June 30, 1882, c. 254, 22 Stat. 117, 118:

An Act Making appropriations for the support of the Army for the fiscal year ending June 30, 1883, and for other purposes.

Be it enacted, etc., * * * That from and after the first day of July, 1882, the ten per centum increase for length of service allowed to certain officers by Section 1262 of the Revised Statutes shall be computed on the yearly pay of the grade fixed by Sections 1261 and 1274 of the Revised Statutes: * * *

Sec. 1612. The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army.

Sec. 1622. The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects,

as are provided for officers of the Army, except as is otherwise provided in the next section.

Act of March 2, 1903, c. 975, 32 Stat. 927, 932:

"An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1904.

Be it enacted, etc., * * * That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement.

Act of June 10, 1922, c. 212, 42 Stat. 625:

An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

Be it enacted, etc., That beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general, of the Navy below the grade of rear admiral, of the Coast Guard, of the Coast and Geodetic Survey and of the Public Health Service below the grade of surgeon general, pay periods are prescribed, and the base pay for each is fixed as follows:

The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.

* * * * * * * *

The pay of the fifth period shall be paid to colonels of the Army, captains of the Navy, and officers of corresponding grade who are not entitled to the pay of the sixth period; to lieutenant colonels of the Army, commanders of the Navy, and officers of corresponding grade who have completed twenty years' service, or whose first appointment in the permanent service was

in a grade above that corresponding to captain in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24; to officers of the Staff Corps of the Navy advanced by selection under existing laws to the rank or pay of commander; and to majors of the Army, lieutenant commanders of the Navy, and officers of corresponding grade who have completed twenty-three years' service: *Provided*, That lieutenant commanders of the Staff Corps of the Navy who were appointed between the dates of March 4, 1913, and June 7, 1916, in a grade above that of ensign, shall receive the pay of this pay period after completing twenty years' service.

The pay of the fourth period shall be paid to lieutenant colonels of the Army, commanders of the Navy, and officers of corresponding grade who are not entitled to the pay of the fifth or sixth period; to majors of the Army, lieutenant commanders of the Navy, and officers of corresponding grade who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24; to captains of the Army, lieutenants of the Navy, and officers of corresponding grade who have completed seventeen years' service, except those whose promotion is limited by law to this grade and who are not entitled under existing law to the pay and allowances of a higher grade; and to lieutenants of the Staff Corps of the Navy, and lieutenants and lieutenants (junior grade) of the line and Engineer Corps of the Coast Guard whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period.

* * * * * * * *

Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years: *Provided*, That the base pay plus pay for length of service of no officer below the grade of colonel of the Army, captain of the Navy, or corre-

sponding grade, shall exceed $5,750. Nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, and service as a contract surgeon serving full time; and also 75 per centum of all other periods of time during which they have held commissions as officers of the Organized Militia between January 21, 1903, and July 1, 1916, or of the National Guard, the Naval Militia, or the National Naval Volunteers since June 3, 1916, and service as a contract surgeon serving full time, shall be included in the computation.

* * * * * * * * *

Sec. 16. That nothing contained in this Act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922, not including additional pay authorized by the Act entitled "An Act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, and Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," approved May 18, 1920; and nothing contained in this Act shall operate to reduce the total of the pay and allowances which any enlisted man of the Army, Navy, Marine Corps, or Coast Guard is now receiving during his current enlistment and while he holds his present grade or rating.

* * * * * * * * *

Sec. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by

law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers, warrant officers, and enlisted men now on the retired list or officers or warrant officers in an equivalent status of any of the services mentioned in the title of this Act. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances.

* * * * * * * * * *

Sec. 22. That the provisions of this Act shall be effective beginning July 1, 1922, and all laws and parts of laws which are inconsistent herewith or in conflict with the provisions hereof are hereby repealed as of that date.

Act of May 8, 1926, c. 274, 44 Stat. 417:

An Act to equalize the pay of retired officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

Be it enacted, etc., That hereafter the retired pay of the officers and warrant officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, who were retired on or before June 30, 1922, shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date: *Provided*, That nothing in this Act shall operate to reduce the pay of any officer or warrant officer now on the retired list.

Sec. 2. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.